No. 81 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WILLIAM HENRY HANCE,

Petitioner,

-against-

WALTER D. ZANT, WARDEN, and
STATE OF GEORGIA,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY,
STATE OF GEORGIA

APPENDICES TO PETITION
VOLUME I

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, providing:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Fifth Amendment to the Constitution of the United States, providing in relevant part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Sixth Amendment to the Constitution of the United States, providing in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . and to have the Assistance of Counsel for his defence.

CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Eighth Amendment to the Constitution of the United States, providing:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

CONSTITUTIONAL PROVISIONS INVOLVED

This case also involves the Fourteenth Amendment to the Constitution of the United States, providing in relevant part:

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Application No. 1776

SUPREME COURT OF GEORGIA

ATLANTA, October 9, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

WILLIAM HENRY HANCE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied. Jordan, C.J., Hill, P.J., Marshall, Clarke, Smith and Gregory, JJ., concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

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David P. Ridgeway, Clerk
Martha R. Sims, Dep. Clerk
Audrey R. Halley, Dep. Clerk
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Office Of
Clerk Superior Court
Butts County
P.O. Box 61
Jackson, Georgia 30233

Hugh D. Sanders, Senior Judge
Forsyth, Ga.
Sam L. Whitmire, Chief Judge
Barnesville, Ga.
R. Alex Crumbley, Judge
McDonough, Ga.
E. Byron Smith, D.A.
Barnesville, Ga.

July 29, 1981

1) Mr. Stephen A. Kermish, Attorney at Law, 1314 Rhodes Haverty Building, 134 Peachtree Street, Atlanta, Georgia 30303 (Certified Mail)
2) Ms. Mary Beth Westmoreland, Assistant Attorney General, Department of Law, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334
3) Warden Walter Zant, GD&CC, POB 3877, Jackson, Georgia 30233
4) Department of Offender Rehabilitation, 800 Peachtree Street, N. E., Atlanta, Georgia 30365
5) Judge John H. Land, Chattahoochee Court Circuit, Muscogee County Courthouse, Columbus, Georgia 31902
6) District Attorney William J. Smith, Chattahoochee Court Circuit, Muscogee County Courthouse, Columbus, Georgia 31902
7) Mr. James L. Stubbs, Clerk Superior Court, Muscogee County Courthouse, Columbus, Georgia 31902

Re: William Henry Hance
vs. Walter D. Zant, Warden
No. 4967

TO THE ABOVE:

Enclosed is a copy of the ORDER denying Petition in the above-stated case, signed by Judge Crumbley on July 27, 1981, and filed in this office on July 29, 1981.

Yours truly,

Audrey R. Halley

AUDREY R. HALLEY
Chief Deputy Clerk

/arh

encl.

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7/27/81

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM HENRY HANCE,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	FILE NO. 4967
	:	
WALTER D. ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Muscogee County. Hance was convicted of murder and attempted theft by extortion. He was sentenced to death for murder and five years imprisonment for attempted extortion. His convictions and sentences were affirmed by the Supreme Court. Hance v. State, 245 Ga. 856 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 41 numbered paragraphs, of which 34 allege substantive claims for relief (7-32; amendments 1-8). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the Petition.

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The record in this habeas case consists of the transcript of the proceedings before this Court on April 8, 1981, and the transcript and record of Petitioner's trial in the Muscogee County Superior Court.

7., 8.

In paragraphs 7 and 8, Petitioner contends his constitutional rights were violated by the allegedly illegal seizure, interrogation, and arrest without probable cause.

The Supreme Court has already concluded probable cause for the seizure and arrest of Petitioner existed. Hance v. State, supra at 863(5). Further, implicit in the Court's conclusion that Petitioner's statements were freely and voluntarily given is the finding that the interrogation of Petitioner was not illegal. Hance v. State, supra at 858(2).

Accordingly, the allegations in paragraphs 7 and 8 are found to be without merit.

9., 10.

In paragraphs 9 and 10, Petitioner charges that military investigators failed to cease questioning him after he requested the opportunity to consult an attorney. This failure violated his Fifth, Sixth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

In passing on the voluntariness of Petitioner's confession, the Supreme Court found that at no point during his interrogation did Petitioner ever request an attorney or ask that the interview be terminated. Hance v. State, supra at 859. Investigator Fox reiterated this fact at the habeas proceeding. (H.T. 34).

Accordingly, the allegation in paragraphs 9 and 10 is found to be without merit.

11., 12.

In paragraphs 11 and 12, Petitioner alleges constitutional violation resulting from the refusal by military officials and Columbus police to reveal Petitioner's whereabouts to his attorney during the interrogation.

The Supreme Court, in determining the admissibility of Petitioner's confession, noted that the local attorney, who had previously represented Hance in civil matters, heard of the arrest and tried to locate him. Hance v. State, supra at 859. The attorney testified he did not handle criminal matters, was not retained but simply wanted to advise Petitioner of his rights. Id. The agents interrogating Petitioner testified they did not know of the attorney's attempts to locate Petitioner, but when they learned of this fact they immediately told Petitioner, who had already confessed, and he refused to see him. Id.

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Accordingly, this allegation is found to be without merit.

13., 14.

In paragraphs 13 and 14, Petitioner complains of constitutional deprivation from the trial court's refusal to allow the attorney who located Hance to testify as to Hance's state of mind at that point or to allow Petitioner to testify as to his willingness to submit to a polygraph exam.

During the trial the attorney was never able to establish exactly when he had seen Petitioner. Any testimony about Petitioner's state of mind, after his confessions, would not be relevant to the issue of voluntariness. Therefore, the trial court's exclusion of the attorney's testimony is not improper.

As to Petitioner's other complaint, results of polygraph exams are only admissible upon an express stipulation of the parties. State v. Chambers, 240 Ga. 76 (1977); Ross v. State, 245 Ga. 173 (1980). Absent an express stipulation in this case, Petitioner's testimony about his willingness to have taken a polygraph exam is clearly irrelevant. The trial court's exclusion of his testimony was not in error.

Accordingly, the allegations in paragraphs 13 and 14 are without merit.

15., 16.

In paragraphs 15 and 16, Petitioner argues that the introduction into evidence of portions of the victim's corpse was needlessly inflammatory, violating his constitutional rights.

The Court concedes that the evidence, portions of the victim's skull including bone chips and teeth (T.T. 875), is inflammatory. However, Petitioner did not object to their admission at trial. Furthermore, such evidence was relevant because it was found at the scene of the crime and supported the State's theory of the weapon used. Green v. State, 242 Ga. 261, 267 (1978); Cape v. State, 246 Ga. 520, 524 (1980). Being material and relevant, there was no error in admission. Green v. State, supra; Cape v. State, supra.

Accordingly, the claim for relief in paragraphs 15 and 16 is found to be without merit.

17., 18.

The issue raised in paragraph 17 and 18 has already been decided adversely to Petitioner. Hance v. State, supra at 865.

19., 20.

The objection raised in paragraphs 19 and 20 has already been decided adversely to Petitioner. Hance v. State, supra at 865.

21., 22.

In paragraphs 21 and 22, Petitioner contends that the jury charge on the element of intent impermissibly

shifted the burden of proof, depriving him of his right to due process.

The relevant portion of the charge is as follows:

> "I'm going to give you certain presumptions of law which are applicable in this case. A presumption is a conclusion that the law draws from given facts. Now, each of these presumptions is rebuttable, that is, they are subject to being overcome by evidence to the contrary. Now, these are as follows: Every person is presumed to be of sound mind and discretion. This presumption may be rebutted. The acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. But these presumptions may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that's you, the jury, may find such intention upon consideration of the words, the conduct, the demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.
>
> A specific intent to commit the crimes charged in this indictment, each count thereof, is an essential element that the State must prove beyond a reasonable doubt. Intent is always a question for the jury and it's ordinarily ascertained by conduct. Intent may be shown in many ways provided you find that it existed from the evidence produced before you. It may be inferred from the proven circumstances or by acts and conduct, or it may be presumed when it is the natural and necessary consequence of the act."

(T.T. 1093-1094.)

The charge clearly indicates the presumption could be rebutted, thereby creating a permissive presumption.

Such permissive presumptions have been found valid. Skrine v. State, 244 Ga. 520 (1979).

Accordingly, this claim for relief is without merit.

23., 24.

In paragraphs 23 and 24, Petitioner contends the trial court's refusal to give an express charge on the issue of venue violated due process.

In concluding that venue was sufficiently established, the Supreme Court noted that no conflicting evidence was introduced. Hance v. State, supra at 858. In light of Petitioner's failure to offer any evidence on this issue, the Court cannot conclude Petitioner was harmed by the lack of an express charge on venue.

Accordingly, this claim for relief is without merit.

25., 26.

In paragraphs 25 and 26, Petitioner claims the trial court erred in excluding relevant mitigating testimony during the sentencing phase of the trial. Petitioner alleges he was not permitted to testify as to his mental state on the day of the offense, particularly to insist that he did not remember committing the crime.

An examination of the transcript reveals that Counsel sought to elicit testimony on the issue of why Petitioner would say and think that he did not kill anyone. (T.T. 1124-25). The court permitted

Counsel to pursue this line of questioning (T.T. 1126) until the court sustained the prosecutor's objection that the issue of Petitioner's mental state, which had not been raised in the course of the trial, was not relevant at that point. (T.T. 1127-28).

The Court concurs with the trial court's view that the proffered testimony was irrelevant in the sentencing phase, not having been previously offered. The trial court should exercise broad discretion in allowing any evidence reasonably tending toward mitigation, but the Court is authorized to hold witnesses "within reasonable bounds." Brooks v. State, 244 Ga. 574, 583-84 (1979). The trial court's exclusion of testimony relative to guilt or innocence was not unreasonable.

Accordingly, the allegation in paragraphs 25 and 26 is found to be without merit.

27., 28.

In paragraphs 27 and 28, Petitioner charges that the District Attorney made improper arguments in both the opening and closing of the guilt/innocence phase and the closing of the sentencing phase.

The Court has examined the prosecution's arguments. Petitioner has taken isolated statements out of context to buttress his claim. However, when read in their entirety, the prosecution's arguments are not improper. Wheeler v. State, 220 Ga. 535 (1965); Chenault v. State, 235 Ga. 216(7)(1975); Leutner v. State, 235 Ga. 77 (1975).

Accordingly, this allegation is found to be without merit.

29., 30.

In paragraphs 29 and 30, Petitioner claims he was denied effective assistance of counsel in the sentencing phase in violation of his constitutional rights.

At the outset the Court notes that attorneys Richard O. Smith and Walter F. Johnson, Jr. were appointed to represent Petitioner. However, Petitioner requested to be lead counsel, so Mr. Smith was appointed to serve as co-counsel. (Motion H.T. 5-12). In an affidavit, Petitioner stated that he had not advised Mr. Smith of what his defense would be or the names or expected testimony of any witnesses. (R. 20). Petitioner now claims Mr. Smith was ineffective for failing to develop any mitigating evidence even without Petitioner's assistance.

Without any guidance from Petitioner, the Court cannot conclude Counsel was ineffective for failing to garner any witnesses in mitigation.

Accordingly, this claim for relief is found to be without merit.

31., 32.

In paragraphs 31 and 32, Petitioner alleges that the acoustics in the new courtroom in which he was tried so adversely affected audibility that he was denied his right to due process.

The prosecutor in this case, Mr. William J. Smith, testified that the courtroom had been completed except for the permanent sound system. (H.T. 14). A portable address system was used. Id. The acoustics were perfect at that time even without the additional precaution of using the portable address system. (H.T. 15).

Further, Mr. Smith testified that the only reference to someone speaking up to be understood more clearly was in regard to Petitioner himself. Id. Petitioner, acting as his own counsel, did not speak loudly enough in cross-examining some witnesses. Id. As a result, the trial judge made several inquiries of the jury whether they were able to hear witnesses. (H.T. 16).

Petitioner has made no showing of bad acoustics or harm resulting therefrom.

Accordingly, this allegation is without merit.

1.

In paragraph 1 of the amended petition, Petitioner claims he was denied effective assistance of counsel.

The Court again notes that Petitioner served as his counsel and was assisted by Richard O. Smith. (See 29,30 supra).

The Court has examined the following allegations and found them to be without merit.

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Counsel failed to file a motion to suppress his confession. The Supreme Court has already concluded Petitioner's statements were freely and voluntarily given. Hance v. State, supra at 858. In light of this finding, the Court cannot conclude Petitioner was harmed by his co-counsel's failure to file such a challenge.

Counsel failed to produce an expert witness to contest the issue of venue. The Supreme Court has already concluded that venue was sufficiently proved. Hance v. State, supra at 858. Petitioner has made no showing of harm from the lack of such an expert. The Court as a result cannot conclude Counsel was ineffective for the reason posed.

Counsel failed to move for a psychiatric examination to determine Petitioner's competency. In addition to the court-ordered psychiatric examination (R. 7), Petitioner was also examined by a psychologist pursuant to the granting of Counsel's motion. (R. 27-28). Both examinations found Petitioner competent.

Counsel failed to present any witnesses in mitigation. See paragraphs 29 and 30 above.

Counsel, acting as co-counsel, filed numerous motions. (R. 8-17; 25-29). At trial, Mr. Smith cross-examined States's witnesses (T.T. 506; 545; 572; 591; 616; 619; 624; 628; 654; 663; 714; 721; 780; 818; 826; 839; 845; 849; 858; 899; 990; 998; 1002; 1011); made motions (T.T. 439-440; 454; 470; 497; 893; 1036; 1038); gave argument during the guilt/innocence phase (T.T. 1042-1053); and gave argument during the sentencing phase (T.T. 1164-1176).

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974). Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379; Hawes v. State, 240 Ga. 327, 329-330 (1977).

Petitioner's co-counsel easily meets this test. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and lack of cooperation by Petitioner. The effort Mr. Smith put forth was certainly reasonably effective within the meaning of the standard.

Accordingly, this claim for relief is found to be without merit.

2.

The Supreme Court has already decided Petitioner's confession was properly admitted. Hance v. State, supra at 858-859; 863-864.

3.

In paragraph 3 of the amended petition, Petitioner complains of error in the jury charge on aggravating circumstances, especially as to the elements of aggravated battery.

Specifically, Petitioner urges that aggravated battery must be construed in pari materia with torture in order to find the Ga. Code Ann. §27-2534.1(b)(7)

aggravating circumstance. Since there was no charge or finding of torture in this case, Petitioner argues that the application of the (b)(7) aggravating circumstance is unconstitutional.

Petitioner's argument is clearly without merit. The terms "torture", "depravity of mind", and "aggravated battery" are disjunctive rather than conjunctive terms as Petitioner contends. Fair v. State, 245 Ga. 868 (1980); Tyler v. State, 247 Ga. 119, 124 (1981). See also Hance v. State, supra at 860(3).

Further, the Supreme Court has already concluded that (b)(7) is "constitutionally applied under the evidence in this case." Hance v. State, supra at 867.

There is also no requirement, as urged by Petitioner, that mitigating circumstances be singled out to the jury, Thomas v. State, 240 Ga. 393 (1977), or that the relationship between aggravating and mitigating circumstances be explained, Gates v. State, 244 Ga. 587(6)(1979).

Accordingly, this allegation is found to be without merit.

4.

In paragraph 4 of the amendment, Petitioner alleges the trial court, in determining Petitioner's competency to assist in his own defense, failed to follow the procedure set out in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Petitioner claims Faretta places an express duty upon the trial court to make the defendant aware of

the dangers and disadvantages of self-representation and further claims such was not done in this case.

At the pretrial motions hearing, Petitioner's motion to serve as his own counsel was discussed at length. (M.T. 5-13).[1] The trial judge inquired into Petitioner's legal knowledge, especially as to whether Petitioner was aware he was facing the maximum penalty of execution. (M.T. 7, 9). The trial judge warned Petitioner he was subject to the rules of procedure and evidence (M.T. 9); that rulings on objections or motions were final (M.T. 9); that directions from the trial court were to be accepted without argument (M.T. 10); that Petitioner would be subject to contempt (M.T. 10); and that the Court would intervene and have his co-counsel instruct Petitioner on how to proceed if such need arose. (M.T. 11).

Further, Counsel for Petitioner stated that he had advised Petitioner against serving as his own counsel. (M.T. 12). There is also the affidavit of Petitioner in which he stated his decision was a product of his free will and that he had been advised of the dangers of serving as his own counsel. (R. 20; T.T. 1034).

The record clearly indicates Petitioner knowingly and intelligently decided to forgo his right to counsel and was well aware of the dangers and disadvantages of

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[1] Motions Transcript of November 27, 1978.

self-representation. The Court finds that the procedures, as such, set out in Faretta v. California, supra, were readily met.

Accordingly, this claim for relief is found to be without merit.

5.

In paragraph 5, Petitioner charges the death penalty is administered arbitrarily, capriciously, and whimsically. In that Petitioner has presented no proof on this issue, the allegation is found to be without merit.

6.

In paragraph 6, Petitioner claims his death is being exacted pursuant to a pattern of State authorities to discriminate on grounds of race, sex and poverty in administering capital punishment. Since Petitioner has made no showing to support his contention, the allegation is found to be without merit.

7.

Petitioner has presented no evidence to show that the death sentence is an excessive penalty which fails to serve any rational interest. Accordingly, the allegation in paragraph 7 is found to be without merit.

8.

The "prosecution-prone" argument raised in paragraph 8 has been rejected by the Supreme Court. Douthit v. State, 239 Ga. 81, 87 (1977); Hawes v. State, 240 Ga. 327(5)(1977).

WHEREFORE, all allegations in the amended petition having been found without merit, the Petition is denied.

SO ORDERED, this 27 day of July, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

C-17

UNITED STATES, Appellee,

v.

Specialist Four William H. HANCE, SSN 226-74-1289, United States Army, Appellant.

CM 438558.

U. S. Army Court of Military Review.

31 Oct. 1980.

Accused specialist four, United States Army, was convicted by court-martial, R. K. McHugh, J., of two specifications of premeditated murder, and he appealed. The Army Court of Military Review, O'Donnell, J., held that: (1) accused had been "apprehended" within meaning of Fourth Amendment prior to interrogation; (2) information presented by the Government fell short of establishing probable cause for arrest; (3) the Government failed to demonstrate that taint of arrest had dissipated prior to accused's confession; and (4) rehearing would be ordered where it appeared that at time of apprehension arresting officers were aware of other evidence, not introduced by the Government, tending to show existence of probable cause.

Findings and sentence set aside; rehearing authorized.

1. Military Justice ⇐245

Testimony of jurors will not be received to impeach their verdict with respect to matters which essentially inhere therein, but exceptions may be made where extraneous prejudicial information was improperly before the jury or where outside influences were improperly brought to bear on the jury.

2. Military Justice ⇐245

Where there were no allegations of extraneous influences, Court of Military Review would decline to consider posttrial statements from several court-martial members, after accused was convicted of two specifications of premeditated murder, that evidence was insufficient to convince such members beyond a reasonable doubt that accused killed one of the victims and was insufficient to convince such members that accused was mentally competent to premeditate murder. Military Rules of Evidence, Rule 606(b).

3. Military Justice ⇐170

Statements obtained as result of illegal arrest are violative of the Fourth Amendment and inadmissible as "fruit of the poisonous tree" but exclusionary rule is inapplicable if the government learned of the evidence from an independent source or if the connection between the illegal arrest and the challenged evidence has become so attenuated as to dissipate the taint. U.S.C.A.Const. Amend. 4.

4. Military Justice ⇐113

"Apprehension" is the taking of a person into custody, and although it may be effected by clearly notifying the person to be apprehended that he is thereby taken into custody, it is the substance of the surrounding circumstances that controls rather than the form. UCMJ, Art. 7(a), 10 U.S.C.A. § 807(a); MCM 1969, par. 19, subd. c.

See publication Words and Phrases for other judicial constructions and definitions.

5. Military Justice ⇐113

Where accused was taken into custody and was not free to leave, he was "apprehended" within meaning of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

6. Military Justice ⇐113

Information that accused had been seen with murder victim on night before she disappeared and had informed military police that he had overheard conversation concerning death of a female soldier fell short of establishing probable cause for arrest. U.S.C.A.Const. Amend. 4; UCMJ, Art. 7(b), 10 U.S.C.A. § 807(b).

7. Military Justice ⇐173

Statement by accused could not be considered in establishing probable cause for

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apprehension where it was not offered for its truth and, in any event, was hearsay as to what accused knew and as such was incompetent evidence.

8. Military Justice ⇐171

Giving of Article 31 and *Miranda* warnings does not operate per se to remove taint from illegal arrest. U.S.C.A.Const. Amends. 4, 5; UCMJ, Art. 31, 10 U.S.C.A. § 831.

9. Military Justice ⇐170

Though accused did not confess until the second day after his arrest, which was not shown to be supported by probable cause, the Government failed to demonstrate that taint of arrest was dissipated, and thus resulting confessions and other derivative evidence was inadmissible, where accused made several admissions during initial stages of interrogation and the taint was exploited by prolonged interrogation and irregular confinement of accused.

10. Military Justice ⇐332

Though fact that evidence unaffected by taint of arrest not shown to be supported by probable cause was insufficient to support findings of guilt would normally require dismissal of charges, rehearing would be ordered at which question of probable cause could be further developed where it appeared that at time of apprehension the arresting officers were aware of evidence not introduced by the Government tending to show existence of probable cause.

Major Robert D. Ganstine, JAGC, argued the cause for the appellant. With him on the brief were Colonel Edward S. Adamkewicz, Jr., JAGC, Lieutenant Colonel John F. Lymburner, JAGC, Major Grifton E. Carden, JAGC, and Captain Peter A. Nolan, JAGC.

Captain Michael C. Chapman, JAGC, argued the cause for the appellee. With him on the brief were Colonel R. R. Boller, JAGC, Major Ted B. Borek, JAGC, Captain Brian X. Bush, JAGC, Captain Glenn D. Gillett, JAGC, and Captain Paul G. Thomson, JAGC.

Before RECTOR, CARNE and O'DONNELL, Appellate Military Judges.

OPINION OF THE COURT

O'DONNELL, Judge:

On the sixth day of September 1977, the nude body of Private First Class Karen Hickman was found on the military reservation at Fort Benning, Georgia. Her clothing was discovered on the first of October of that year as the result of an anonymous telephone call to the military police. Several months later, on the third of April 1978, the military police received a telephone call from a person identifying himself as a member of the "Forces of Evil." The caller stated that the body of a woman named Irene could be found on one of the Fort Benning ranges. A search of the area resulted in the discovery of a practically-nude body of a woman later identified as Irene Thirkield, a civilian resident of nearby Columbus, Georgia. On the following day, two criminal investigators, Special Agent Richard F. Fox and Special Agent Marvin D. Besson, located the appellant at his unit and brought him to their office where he eventually confessed to the killing of both women. At his subsequent court-martial, the appellant was convicted of two specifications of premeditated murder and sentenced to a dishonorable discharge, total forfeitures, confinement at hard labor for life, and reduction to the lowest enlisted grade. The convening authority approved the sentence.[1]

After trial, the defense counsel petitioned the convening authority to disapprove the Hickman charge and to reduce the Thirkield charge to unpremeditated murder. In support of his petition, he offered statements from several court-martial members. Five of the nine members sitting on the

1. Hance was also convicted by a Georgia court of killing Gail Jackson, a local civilian. He received the death sentence for this offense.

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court signed individual unsworn statements in which they stated that the evidence presented at trial "was insufficient to convince me beyond a reasonable doubt that SP4 Hance killed PVT Karen Hickman." Four of these members also signed unsworn statements in which they stated that the evidence "was insufficient to convince me that SP4 Hance was mentally competent to premeditate murder." The staff judge advocate referred to the petition in his post-trial review without further comment. The convening authority took no direct action on the petition, although, as noted, he did approve the sentence as adjudged, thereby impliedly approving the findings.

[1, 2] The military follows the general rule that "testimony of jurors will not be received to impeach their verdict, with respect to matters which essentially inhere therein...." *United States v. Bourchier*, 5 U.S.C.M.A. 15, 27, 17 C.M.R. 15, 27 (1954). Exceptions may be made "where extraneous prejudicial information was improperly before the jury or where outside influences were improperly brought to bear on the jury...." *United States v. Higdon*, 2 M.J. 445, 455 (ACMR 1975). As there is no allegation of such extraneous influences, we decline to consider these statements. *See United States v. West*, 23 U.S.C.M.A. 77, 48 C.M.R. 548 (1974), and cases cited therein. *See also*, Rule 606(b), Military Rules of Evidence.

[3] The appellant also contends, as he did at trial, that his several written and oral statements were inadmissible as the product of an illegal apprehension. Statements obtained as a result of an illegal arrest are violative of the Fourth Amendment and inadmissible as "fruit of the poisonous tree." *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Not all evidence obtained following an illegal arrest is inadmissible. As the Court noted in *Wong Sun*, the exclusionary rule is inapplicable if the Government learned of the evidence from an independent source or if the connection between the illegal arrest and the challenged evidence has become "'so attenuated as to dissipate the taint.'" *Id.* at 487, 83 S.Ct. at 417, quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920). *See Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980).

Our analysis then must focus primarily on three areas of concern: was the appellant apprehended within the meaning of the Fourth Amendment; if so, was the apprehension supported by probable cause; and, assuming an illegal apprehension, was the taint sufficiently dissipated to permit use of the challenged evidence at trial.

I

[4] An apprehension, which is the military analogue of a civilian arrest, is "the taking of a person into custody." Article 7(a), Uniform Code of Military Justice, 10 U.S.C. § 807(a). Although it may be effected by "clearly notifying the person to be apprehended that he is thereby taken into custody" (paragraph 19c, Manual for Courts-Martial, United States, 1969 (Revised edition)), it is the substance of the surrounding circumstances that controls rather than the form. *See United States v. King*, 42 C.M.R. 1004, 1006 (AFCMR 1970).

[5] In the instant case, Agent Fox testified that he "apprehended Specialist Hance as a suspect in the murder of Irene Thirkield." He so advised the appellant and told him to accompany him to his office. The appellant was not free to leave without permission from Fox.

Special Agent Besson provided a somewhat different version of the initial meeting with the appellant on 4 April. According to Besson, he and Fox told the appellant that they "wanted to talk to him about the two women that had been killed downtown, and we asked him if he would come with us to our office and he agreed." On cross-examination, however, Besson stated that he and Fox took the appellant into custody and that he was not free to leave.

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Under the circumstances we are satisfied that the appellant was apprehended within the meaning of the Fourth Amendment.[2]

II

We turn then to the question of probable cause. An arrest or seizure under the Fourth Amendment must be founded on probable cause. *Wong Sun v. United States, supra.* The military equivalent of probable cause is found in Article 7(b) of the Code.[3]

[6, 7] The facts and circumstances relied on by the Government at trial as expressed by Agent Fox were essentially two-fold. The first and most immediate was that on 3 April 1978 Fox received word that the appellant had been seen in a bar with Irene Thirkield on the night she disappeared. The second related to the appellant's previous dealings with the military police. On the sixth of December 1977, the appellant voluntarily came forward and informed the military police authorities that he had overheard two or three Blacks in a club at Fort Benning discussing the death of a female soldier. A few weeks later, he informed the military police that some Blacks walked into a club where he was and immediately walked out. He neither saw nor heard anything significant at that time and received no threats from anyone. In the middle of January, Fox met with the appellant to see if he had received any further information. The appellant indicated that he had not. At that time, the appellant's fingerprints were taken with his consent.[4] Fox testified that he believed he had probable cause to apprehend the appellant.[5]

We are not satisfied that the evidence presented by the Government was sufficient to warrant a prudent person in concluding that the appellant had committed an offense. The information certainly warranted additional questioning but fell short of establishing probable cause to arrest the appellant.[6]

III

We turn then to the question of whether the taint of the illegal apprehension was dissipated.

The appellant was taken to the CID office at approximately 1330 hours on 4 April. He was immediately informed of his right

2. The Government's position at trial was that there was an apprehension based on probable cause. On appeal, however, the Government contends *inter alia* that the appellant was not apprehended within the meaning of the Fourth Amendment but voluntarily accompanied the agents to the CID office.

3. "Any person authorized under regulations governing the armed forces to apprehend persons subject to [the Code] or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." *See Beck v. Ohio,* 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964).

4. Fox stated in response to a question that the appellant was not a suspect at this time. Fingerprints were being taken routinely from "anyone that was connected in any way with the case."

5. Agent Besson, on the other hand stated that he did not believe there was probable cause to apprehend the appellant on 4 April. Besson's position seems to be that there was no apprehension but that the appellant voluntarily accompanied the agents to the CID office. This also was the basis for the judge's ruling admitting the statements as reflected in his special findings.

6. The Government would have us consider a handwritten statement by the appellant authorizing the taking of voice samples. In that statement (Prosecution Exhibit 8), which was dictated to the appellant by Agent Besson, there appears the following: "I have been informed by CID agent Besson that he had received information that I have made telephone calls concerning two Columbus women that has [sic] been killed." The Government points out that the previous day the appellant's company commander and first sergeant identified his voice from a recording of the anonymous telephone call informing the authorities of the location of Irene Thirkield's body. Inexplicably, this information was not presented by the Government on the issue of probable cause. The statement in Prosecution Exhibit 8 cannot be considered by us for this purpose. It was not offered for its truth and thus has no relevance as to probable cause. Even if it had been offered for its truth, it is hearsay as to what Besson knew and as such incompetent evidence.

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to counsel and of his right to remain silent, both of which he waived. He was then questioned about the Thirkield death until about 2200 hours that night. Initially, the appellant stated that he met Miss Thirkield at a local bar on 15 March and took her to a club on the Fort Benning reservation. He added that he later left her and went home by himself. During this interrogation, the appellant provided Agent Besson with handwriting exemplars. He then admitted writing several letters to the Columbus police authorities and one to a local newspaper. These letters were purportedly written on behalf of the "Forces of Evil" concerning Irene Thirkield and Gail Jackson. He claimed that the "Forces of Evil" compelled him to write the letters. The appellant then told his interrogators that he was coerced by the "Forces of Evil" to pick up Irene Thirkield and deliver her to them on the evening in question. The appellant also admitted making several telephone calls to the military police, again claiming that he was forced to do so by the "Forces of Evil." After Fox finished questioning him that day, the appellant was interviewed by agents of the Federal Bureau of Investigation and members of the Columbus police force. He was then placed in bachelor enlisted quarters under guard for the night.

The following morning the criminal investigators, after first warning him of his rights, continued questioning the appellant. At this time, he admitted being present when Irene Thirkield and Gail Jackson were killed, but denied that he assisted in the killings. However, after a lunch break, the appellant admitted killing the two women himself. He also admitted that there was no such organization as the "Forces of Evil." His confession was reduced to writing and received in evidence over objection at his trial.

The agents, after appropriate warnings, then questioned the appellant about the Karen Hickman killing. He first stated that he overheard two men discussing the killing but was told to keep his mouth shut. Then, according to the appellant, he was told to call the military police and inform them of the location of Hickman's clothing. This statement was reduced to writing and received in evidence over objection. The questioning on 5 April ended at 1800 hours. The appellant was returned to the same room where he remained for the night under guard.

The following day, after being warned of his rights, the appellant admitted killing Karen Hickman. This statement was also reduced to writing and received in evidence over objection. After confessing to the Hickman killing, the appellant took the agents to the scene of the crime and showed them where he had thrown her clothing.

[8] In *Brown v. Illinois, supra*, the Supreme Court reaffirmed the principles announced in *Wong Sun* and enunciated several factors to be considered in determining whether a confession has been obtained by exploitation of an illegal arrest. "The temporal proximity of the arrest, . . . the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant. And the burden of showing admissibility rests, of course, on the prosecution." *Brown v. Illinois*, 422 U.S. at 603–04, 95 S.Ct. at 2261–62 (Citations and footnotes omitted.).[7] Neither *Wong Sun* nor *Brown* established a "but for" or *per se* rule. Rather, the issue must be decided on the facts of each case. It must be emphasized that in this area we are dealing with the protection of Fourth Amendment rather than Fifth Amendment rights. "Thus, even if the statements in this case [are] found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Id.* at 601–02, 95 S.Ct. at 2260–61.[8]

7. The Court also noted that "*Miranda* warnings are an important factor" in this equation. *Id.* Of course, if *Miranda* warnings are not given when required, the resulting confession is inadmissible on *Miranda* grounds without regard to Fourth Amendment considerations. *See* note 8, *infra*.

8. Voluntariness is a threshold requirement. If the statements are determined to be involuntary under the Fifth Amendment, the Fourth

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[9] The factor of temporal proximity contemplates that the passage of time between the arrest and the confession diminishes the probability that the confession is tainted. In the instant case, the appellant did not confess until the second day. However, he made several admissions during the initial stages of the interrogation. In fact, immediately upon being apprehended, he said, "I will tell you about the girl." Moreover, a significant passage of time, depending on the circumstances, can increase rather than diminish the likelihood of a tainted confession. As Justice Stevens noted in his concurring opinion in *Dunaway v. New York*, 442 U.S. at 220, 99 S.Ct. at 2260:

> The temporal relationship between the arrest and the confession may be an ambiguous factor. If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest rather than a short one.

In this case the apprehension was exploited in that the interrogation was prolonged and the appellant was not free to leave. Indeed, he was confined to bachelor enlisted quarters for two nights.[9]

As to the purpose and flagrancy of the police action, this factor was important in *Brown* because of the obvious impropriety of the arrest in that case. Here, although the apprehension was not flagrant, it was investigatory in nature, a significant consideration in *Brown*.[10] This "purpose and flagrancy" factor assumed less importance in *Dunaway* where the police apparently acted in good faith and the arrest was not flagrant.[11] The Court in that case attached more significance to the lack of intervening circumstances. In the instant case, there were no significant intervening circumstances which would attenuate the taint. To the contrary, as noted, the taint was exploited by the prolonged interrogation and the irregular confinement of appellant.

The Government has failed to establish the legality of the appellant's apprehension and has not demonstrated that this taint was dissipated. The resulting confessions and other derivative evidence therefore were inadmissible.[12]

[10] As the unaffected evidence is insufficient to support the findings of guilty, the

Amendment question is never reached. We are satisfied that the appellant's statements meet the requirements of the Fifth Amendment and Article 31 of the Code, 10 U.S.C. § 831 and therefore are voluntary. The giving of Article 31 and *Miranda* warnings, however, does not operate *per se* to remove the taint from an illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

9. When asked why the appellant was not placed in the stockade after the first day's interrogation, Agent Besson remarked that he did not consider they had sufficient evidence for that purpose and they feared that the appellant, once he had been confined in the stockade, would refuse to cooperate in answering questions.

10. In *Brown*, the Court noted at p. 605, 95 S.Ct. at p. 2262:

> The impropriety of the arrest was obvious; awareness of the fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." . . . The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up.

11. *See United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), where the Fifth Circuit En Banc adopted a new rule for that circuit whereby "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken belief that they are authorized." 622 F.2d 840. This is the position taken by the two dissenting justices in *Dunaway* and inferentially rejected by the majority and concurring justices.

12. The Government argues that *Dunaway*, which was decided during the *Hance* trial, should not be applied retroactively. Although there is authority to the contrary (*e. g., United States v. Tucker*, 610 F.2d 1007 (2d Cir. 1979)), we need not reach that issue. The only new issue resolved by *Dunaway* was "the legality of custodial questioning on less than probable cause for a full-fledged arrest." *Dunaway v. New York*, 442 U.S. at 202, 99 S.Ct. at 2251 (1979). That issue is not present in this case. The basic principles announced in *Wong Sun* and *Brown* remain unchanged in *Dunaway* and are controlling here.

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conviction must be reversed. This would normally require dismissal of the charges. However, it appears that at the time of the apprehension the arresting officers were aware of other evidence, unaccountably not introduced by the Government, tending to show the existence of probable cause. In an exhibit to its appellate brief, the Government presented information showing that on the day before the appellant was apprehended Fox and Besson were informed that the appellant's company commander and the first sergeant identified him as the person who made the telephone call concerning the location of Irene Thirkield's body. *See* note 6, *supra*. Under the circumstances, a rehearing may be ordered at which the question of probable cause for the apprehension may be further developed. *See United States v. Davenport*, 14 U.S.C.M.A. 152, 33 C.M.R. 364 (1963).

The findings of guilty and the sentence are set aside. A rehearing is authorized.[13]

Chief Judge RECTOR and Senior Judge CARNE concur.

13. We note that the military judge over defense objection used the reasonable doubt instruction held to be deficient in *United States v. Salley*, 9 M.J. 189 (CMA 1980). This deficiency, we are certain, will be corrected at any rehearing.

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SUPREME COURT OF GEORGIA

245 Ga. 856

36012. HANCE v. THE STATE.

UNDERCOFLER, Chief Justice.

The appellant, William Henry Hance, was convicted by a jury in the Superior Court of Muscogee County of the murder of Gail Faison and attempted theft by extortion. He was sentenced to death for the murder and five years imprisonment for the attempted extortion. This is his appeal.

Summary of Facts.

From the evidence presented at trial, the jury was authorized to find the following facts:

On or about February 28, 1978, the appellant, a soldier stationed at Fort Benning, Columbus, Georgia, went to the Sand Hill Bar located near the base for a drink. While in the bar, he was solicited by the victim, a prostitute named Gail Faison, also known as Gail Jackson or Gail Bogen. The appellant agreed to a price of $20.00 and they got into his car. He drove 200 yards up the road to an area she selected and stopped. She began to undress when the appellant for no other reason than the victim was a prostitute, became enraged. He grabbed the victim and as she tried to get away, he hit her with a karate chop across her head. She fell unconscious. The appellant then pulled her out of the car, dislocating her elbow in the process. He returned to his car for a moment, but thinking she was still alive, he got a jack handle from his car, and finding his victim to be still breathing, repeatedly struck the helpless victim in the face. The beating was so severe that the victim's entire face was destroyed and bone fragments were scattered about the area. Some of the victim's brain tissue was literally beaten from the skull. The force of the appellant's attack was so great it produced a depression in the ground behind the victim's head. The appellant then buried the victim's body in a shallow grave he dug with an entrenching tool.

During this period of time, the City of Columbus was being terrorized by a series of unsolved strangulation murders. Beginning on March 3, 1978, the appellant, in order to avert suspicion from himself, sent a total of five letters to the Chief of Police of Columbus, Georgia, and

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one letter to the local newspaper. These letters were written on Army stationery and demanded that either the Columbus strangler be caught by a certain date or a female named Gail Jackson would be executed. The letters were signed "Forces of Evil," a fictitious group the appellant had created. The second of these letters received by the Chief of Police demanded either the apprehension of the Columbus strangler or a $10,000 ransom in return for the victim's safety. In addition, the appellant found an Army Cap with a different unit insignia than his unit and placed this near the crime scene, also in order to avert suspicion.

On March 15, 1978, the appellant went to Vice Mitchell's Bar. While there, Irene Thirkield asked him to give her a ride to the Sand Hill bar. While in appellant's car she solicited him. After she had removed her clothes, appellant again became enraged and attacked her in the same manner as he had attacked the first victim. He beat Irene Thirkield so severely that her entire head was missing from her body. Appellant hid her body on the military reservation behind a pile of logs.

On March 30, 1978, the appellant called the military police and told them exactly where to find Gail Faison's body. The body was recovered that afternoon.

Appellant thereafter added the name "Irene" to the letters he was sending to the police chief and stated that she, like his first victim, would die unless the terms were met. In the fourth letter received by the Columbus police, the appellant detailed the exact manner of the killing of Gail Faison, including the dislocated elbow.

Again, in a similar manner to the calls made regarding his first victim, the appellant called the military police.

The military police, acting upon information that the appellant was the last person seen with Irene Thirkield, questioned the appellant and obtained a confession as to both murders. Subsequently, the appellant also gave a confession to Columbus authorities. He told authorities where he had disposed of the murder weapons and clothes of the victims. These were subsequently recovered. Handwriting samples were obtained from the appellant and were matched with handwriting on the letters

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received by the chief of police. A fingerprint from one of the letters was determined to be that of the appellant.

Enumerations of Error.

1. Appellant contends in his first enumeration of error that the State failed to prove venue sufficiently as a matter of law.

The State presented evidence that the body of the victim was found within Muscogee County in close proximity to the Fort Benning military reservation. Agent William Wanninger testified that he pointed out the location of the body to the City Engineer of Columbus, Georgia, James D. Webb. The city engineer testified that the location shown to him was situated within the county and was not part of the Federal military reservation. No conflicting evidence was introduced. *Climer v. State*, 204 Ga. 776 (51 SE2d 802) (1949). This evidence was sufficient to establish venue in Muscogee County. *Wimbash v. State*, 70 Ga. 718 (3) (1883); *Ellard v. State*, 233 Ga. 640 (212 SE2d 816) (1975); *Aldridge v. State*, 236 Ga. 773 (225 SE2d 421) (1976).

2. In his second enumeration of error, appellant asserts that the trial court erred in failing to suppress his confessions because they were not freely and voluntarily given. Appellant urges that the criteria enumerated in the case of *Riley v. State*, 237 Ga. 124 (226 SE2d 922) (1976), should be used in determining the voluntariness of the confession. *Riley*, however, involved the confession of a juvenile. The State is under a heavier burden in showing that a juvenile understood and waived his rights. See *Massey v. State*, 243 Ga. 228 (253 SE2d 196) (1979). Therefore, the criteria set forth in that case does not apply in the case of an adult's confession.

The appellant was given a Jackson v. Denno hearing and the trial court determined that the confession was freely and voluntarily given. The trial court's determination was not clearly erroneous. Under these circumstances the determination in favor of admissibility is accepted by the appellate court. *Johnson v. State*, 233 Ga. 58 (209 SE2d 629) (1974); *Amadeo v. State*, 243 Ga. 627 (255 SE2d 718) (1979); *Burney v. State*, 244 Ga. 33 (257 SE2d 543) (1979); *McCiesky v. State*, 245 Ga. 108 (263

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SE2d 146) (1980). In this case the evidence shows that agents from the military criminal investigation division stationed at Fort Benning, acting through appellant's commanding officer, requested that appellant accompany them to CID headquarters for the purpose of being interviewed. Appellant readily agreed. The interview began at approximately 12:45 p.m. and lasted until 10:20 p.m. Appellant was advised of his rights under the Fifth and Sixth Amendments. He signed a waiver and was informed that the interview pertained to the murder of Irene Thirkield. Appellant made incriminating statements that afternoon in which he admitted writing the letters signed "Forces of Evil," but was compelled to do so by that "organization." The appellant was then interviewed by local authorities and the F.B.I. He was housed overnight in the Bachelor Enlisted Quarters under guard. The next morning at approximately 7:30 a.m. he was again advised of his rights and he signed a written waiver. The interview terminated at 3:00 p.m. after a written confession was obtained. The appellant was interviewed for a total time of 18 hours. During this period, however, he was fed lunch and dinner, allowed to use the restroom, smoke and eat snacks. The questioning was not continuous but was spread over a two-day period. At no time did the appellant request an attorney or ask that the interview be terminated. A local attorney who had represented the appellant in civil matters heard of his arrest and called the county jail, Columbus police headquarters and CID headquarters at Fort Benning. He testified he did not handle criminal matters, was not retained but simply wanted to advise the appellant of his rights. The attorney was not able to locate the appellant.

The agents questioning the appellant testified they did not know that an attorney was attempting to find the appellant, but when they learned this fact they immediately told the appellant, who had already confessed, and he refused to see him.

No threats nor promises were made to the appellant during the interrogation.

Under these circumstances, appellant's statement was freely and voluntarily given and the trial court did

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not err in failing to exclude it.

3. In his fourth enumeration of error, appellant attacks the constitutionality of Code Ann. § 27-2534.1 (b) (7). He argues that any injury grave enough to cause death is an aggravated battery within the statute and therefore the statute is overbroad and vague in violation of the due process clause of the United States Constitution and the Constitution of the State of Georgia. However, the Supreme Court of the United States has upheld the constitutionality of the statute when attacked on these same grounds. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). This court has held that this Code section will not be permitted to become a "catchall" and upon sentence review will restrict affirmance to those cases which lie at the very core of the Code section. *Harris v. State*, 237 Ga. 718 (230 SE2d 1) (1976). See *Patrick v. State*, 245 Ga. 417 (265 SE2d 553) (1980).

Recently the United States Supreme Court has considered this section as applied to a specific factual situation. Godfrey v. Georgia, 48 USLW 4541 (1980). In Godfrey v. Georgia, it was held that Code Ann. § 27-2534.1 (b) (7), although constitutional, was unconstitutionally applied under the specific facts of that case. In order for Code Ann. § 27-2534.1 (b) to be constitutionally applied in a given case, we hold that the evidence presented at trial must satisfy the following criteria as they apply to the specific factual situation of each case.

Code Ann. § 27-2534 (b) (7) provides in pertinent part: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim."

This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated batter to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining "[w]hether . . . the evidence supports the jury's or Judge's finding of [this] statutory aggravating circumstance . . . " (Code Ann. § 27- 2537 (c)

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(2)), the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component, as hereinafter set forth. See *Fair v. State*, 245 Ga. 868 (1980), post.

The phrases "outrageously or wantonly vile, horrible or inhuman" are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Godfrey v. Georgia, supra.

Under the plain meaning of the statute, not only must the murder be outrageously or wantonly vile, horrible or inhuman, but in addition, the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant as hereinafter explained.

An aggravated battery occurs when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Code Ann. § 26-1305. In order to constitute aggravated battery, the bodily harm to the victim must occur before death. Godfrey v. Georgia, supra.

Torture occurs when the victim is subjected to serious physical abuse before death. Godfrey v. Georgia, slip opinion, p. 10. Serious sexual abuse may be found to constitute serious physical abuse. *House v. State*, 252 Ga. 140 (205 SE2d 217) (1974). Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined.

Evidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse (i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant.

Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies in-

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stantaneously with little or no forewarning does not involve torture or aggravated battery (Godfrey v. Georgia, 48 USLW 4541 (1980); *Mulligan v. State*, 245 Ga. 266 (264 SE2d 204) (1980)); i.e., only facts showing aggravated battery or torture (as hereinabove defined)), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. The instantaneous death of a victim as a result of being killed by a shotgun, although the scene of death be gruesome (no other facts appearing), does not constitute torture, aggravated battery or depravity of mind. (Godfrey v. Georgia, supra.)

Where only facts occurring prior to death are relied upon to support a finding of torture or aggravated battery, the fact that the victim was tortured or was the victim of an aggravated battery will also support a finding of depravity of mind of the defendant; i.e., a defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

In determining whether the evidence shows "depravity of mind," the age, and the physical characteristics of the victim may be considered. See *Thomas v. State*, 245 Ga. 688 (1980).

A defendant who mutilates or seriously disfigures the victim's body after death (cf. Code § 26-1305, supra), or who commits a sex act upon the victim's body after death may be found to have a depraved mind and such acts would be sufficient to show depravity of mind of the defendant within the meaning of the statute.

Where it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death.

As heretofore stated, the evidence must be sufficient to satisfy the first major component of statutory aggravating circumstance seven (7) ("outrageously or wantonly vile, horrible or inhuman"), and at least one (or

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more) of the three parts of the second component (aggravated battery to the victim, or torture to the victim, or depravity of mind of the defendant).[1]

Review of the actual application of the section to the evidence in the case is a matter of sentence review and will be considered in that division of this opinion.

4. The trial court in the sentencing phase instructed the jury that they were authorized to consider the death penalty if they found the following statutory aggravating circumstance beyond a reasonable doubt: "The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim." Code Ann. § 27-2534.1 (b) (7).

Appellant in his third enumeration of error argues that under Code Ann. § 27-2534.1 (b) (7), a jury is not authorized to impose a death penalty unless they find not only an "aggravated battery," but also "depravity of mind." This enumeration is without merit.

To have charged "depravity of mind" would have given the jury an additional ground in which the jury could have found the existence of the statutory aggravating circumstance and therefore would have been detrimental to the appellant. See Division 3. Appellant cannot complain of a charge which is beneficial to him.

5. Appellant's fifth enumeration of error contends that his statements made during his interrogation should have been excluded because these statements were the product of an illegal arrest without probable cause. Appellant argues that an arrest is a seizure within the meaning of the Fourth Amendment and therefore an arrest absent probable cause violates the amendment, thereby triggering the exclusionary rule. Dunaway v. New York, — U. S. — (99 SC 2248, 60 LE2d 824) (1979). However, appellant never challenged the legality of his arrest and raises this argument for the first time on appeal. *Fleming v. State*, 243 Ga. 120 (252 SE2d 609) (1979); *Mallory v. State*, 230 Ga. 657 (198 SE2d 677)

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[1]Justice Harold Hill is the author of Division 3 of this opinion.

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(1973); *Jackson v. State*, 229 Ga. 191 (190 SE2d 530) (1972). The legality of the arrest not being challenged below, the trial court did not err in admitting defendant's confessions.

Notwithstanding appellant's failure to object below, we find that upon careful examination of the record, probable cause for the appellant's arrest existed.

Agents of the military police were in possession of the following information prior to appellant's arrest. First, from the phone calls they knew the person who killed the victims was a young black male. Second, they knew that the perpetrator was a soldier because the calls they received showed an intimate knowledge of the military reservation and the letters were written on military stationery. Also, a military cap was found near one of the bodies. Finally, they knew that the appellant, a young, black male soldier, was the last person seen with a victim prior to her death. Such information would lead a reasonably cautious person to believe that appellant had committed the offense, thereby furnishing probable cause for his arrest. See Propes v. United States, 358 U. S. 307 (1958); Beck v. Ohio, 379 U. S. 89 (1964); *Strauss v. Stynchcombe*, 224 Ga. 859 (165 SE2d 302) (1968); *Peters v. State*, 114 Ga. App. 595 (152 SE2d 647) (1966).

6. In his sixth enumeration of error, appellant contends not only that the rule of Witherspoon v. Illinois, 391 U. S. 510 (1967), was violated with respect to four veniremen, but also that the trial court used a "double standard" when it failed to exclude a venireman for cause as being predisposed to the imposition of the death penalty. We do not agree. The transcript shows that the prospective jurors' opposition to capital punishment met the Witherspoon test as reiterated in Lockett v. Ohio, 438 U. S. 586 (1978); *Harris v. Hopper*, 243 Ga. 244 (253 SE2d 707) (1979).

One potential juror, upon voir dire examination, favored the imposition of the death penalty. However, it is clear from the transcript that this potential juror would consider both punishments authorized by law in her deliberations. She was not "irrevocably committed" to the sentence of death no matter what the facts and circumstances of the case. It therefore follows that the

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court's failure to excuse the juror upon motion was not based upon a "double standard." *Patrick v. State*, supra.

7. The appellant was represented prior to trial by court-appointed counsel. Appellant moved that he be allowed to represent himself at trial, which motion was granted. However, court-appointed counsel assisted the appellant throughout the trial. Counsel examined potential jurors, cross examined witnesses and made timely objections. Prior to trial appointed counsel had filed pretrial motions. On appeal, appellant is represented by two appointed attorneys. Appellant, however, has filed in letter form a list of errors which he requests we address. While such a procedure is improper, we will nevertheless address the issues presented.

The evidence viewed in a light most favorable to the verdict would authorize a rational trier of fact to find each essential element of the crimes of murder and attempted theft by extortion beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

The failure to afford the appellant a preliminary hearing is not grounds for reversal. *State v. Middlebrooks*, 236 Ga. 52 (222 SE2d 343) (1976).

The appellant complains that he was not afforded a State-appointed expert to examine the murder weapon nor given a pretrial lineup. However, these issues were not raised below and no request was made by oral or written motion. See *Fleming v. State*, supra.

The State introduced over objection evidence of the murder of the second victim to show scheme, motive, intent or design. The method used was identical in both crimes, and both crimes were a part of a continuing criminal enterprise. The evidence was properly admitted. *McClesky v. State*, supra.

The State was not required to tender an autopsy report of the second victim as the medical examiner testified as to the cause of death.

During the cross examination of appellant's character witness, the district attorney inquired about a crime occurring in Virginia in order to test the witness's knowledge of the reputation of the defendant. Neither appellant nor his counsel objected and in fact appellant argued a reference to this crime to the jury in closing. This

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argument is without merit. *Moulder v. State*, 9 Ga. App. 438 (1911); *Jackson v. State*, supra; *Fleming v. State*, supra.

It is apparent from the brief filed that appellant's counsel had a transcript and the appellant cannot complain he was not furnished an additional copy. See *Mydell v. Clerk, Superior Court of Chatham County*, 241 Ga. 24 (243 SE2d 72) (1978).

Finally, appellant has called attention to the fact that a deputy clerk and not a magistrate had signed his arrest warrants. This argument is without merit. Shadwick v. City of Tampa, 407 U. S. 345 (1972); *Johnson v. State*, 111 Ga. App. 298 (141 SE2d 574) (1965).

Sentence Review.

As required by Ga. L. 1973, p. 159 et seq., Code Ann. § 27-2537 (c) (1-3), we have reviewed the death sentence in this case. We have considered the aggravating circumstances found by the jury, the evidence concerning the crime and the defendant pursuant to the mandate of the statute. We conclude that the sentence of death imposed in this case was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

The jury found the following aggravating circumstances: "The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to the victim." Code Ann. § 27-2534.1 (b) (7).

Under the evidence of this case, the victim was struck on the head with a karate chop and fell over bleeding. She was pulled from the car with such force that her elbow was dislocated. All of these injuries occurred prior to death. The victim, again while still alive, was beaten with a tire jack with such force and savagery that when found her face from the top of the eyes down was completely missing, and parts of her jaw and skull were found within a nine foot radius of the body. The cause of death was *multiple* compound fractures of the skull and face, and evulsion (removal) of the victim's brain. Although it is unknown at what exact time during the beating the victim died, the jury was authorized to find from the evidence, an aggravated battery prior to death in that the victim's

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elbow and face were at a minimum rendered useless. Code Ann. § 26-1305. See *Baker v. State*, 245 Ga. 657 (1980).

The murder was outrageously or wantonly vile, horrible or inhuman in that this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. The victim was not killed instantaneously, she was not a member of the appellant's family, nor was she subjecting him to any emotional trauma. She gave the appellant no reason whatsoever to assault her, and was in no manner threatening. The appellant showed no remorse for the killings and attempted in every manner to hide his crime. Under the evidence of this case, it cannot be argued that the nature of the injuries to the victim was not of the type universally condemned as outrageously or wantonly vile or inhuman. See *Patrick v. State*, supra.

Under the evidence of this case, the aggravated battery was of such a nature as to go to the very core of Code Ann. § 27-2534.1 (b) (7), and the section is constitutionally applied under the evidence in this case. Godfrey v. Georgia, supra, Division three.

We find that the evidence factually substantiates and supports the finding of this aggravating circumstance and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). We have thoroughly reviewed the instruction of the trial court during the sentencing phase of the trial and find that the charge was not subject to the defects dealt with in *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1978), and *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1978). In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support affirmance of the death penalty. Appellant's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

Argued March 11, 1980 — Decided June 24, 1980.

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REHEARING DENIED JULY 15, 1980.

Murder, etc. Muscogee Superior Court. Before Judge Followill.

Richard O. Smith, William Alexander Byars, for appellant.

William J. Smith, District Attorney, Arthur K. Bolton, Attorney General, Mary Beth Westmoreland, Staff Assistant Attorney General, for appellee.

APPENDIX.

Jackson v. State, 229 Ga. 191 (190 SE2d 530) (1972); *Owens v. State,* 233 Ga. 869 (214 SE2d 173) (1975); *Chenault v. State,* 234 Ga. 216 (215 SE2d 223) (1975); *Harris v. State,* 237 Ga. 718 (230 SE2d 1) (1976); *Young v. State,* 239 Ga. 53 (236 SE2d 1) (1977); *Potts v. State,* 241 Ga. 67 (243 SE2d 510) (1978); *Patrick v. State,* 245 Ga. 417 (265 SE2d 553) (1980).

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM HENRY HANCE, Petitioner, -v- WALTER D. ZANT, Warden, Georgia Diagnostic & Classification Center, Respondent.	HABEAS CORPUS NO. ____

PETITION FOR WRIT OF HABEAS CORPUS, FOR A STAY OF EXECUTION, AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

(1) William Henry Hance petitions this court for a writ of habeas corpus pursuant to Ga. Code Ann. §50-127. In support of his petition, he alleges the following:

(I. INTRODUCTION)

(2) William Hance is being wrongfully detained by Walter D. Zant, the Warden of the Georgia Diagnostic & Classification Center in Jackson, Butts County, Georgia, pursuant to convictions and sentences which have been imposed upon him by the State of Georgia in violation of the Constitution and laws of the State of Georgia and the Constitution of the United States.

(II. PRIOR PROCEEDINGS)

(3) William Hance was tried in the Superior Court of Muscogee County on December 11-16, 1978 for murder and for attempted theft by extortion. He was convicted of both charges and was sentenced to death in the electric chair for murder, and to five years imprisonment for attempted theft by extortion.

He appealed to the Supreme Court of Georgia, which affirmed the judgment below. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). A timely petition for rehearing was denied on July 15, 1980.

(4) William Hance then filed a petition for a writ of certiorari in the Supreme Court of the United States. On December 15, 1980, the Supreme Court denied the petition. Hance v. Georgia, __U.S.__, 49 U.S.L.W. 3443 (U.S., Dec. 16, 1980). A timely petition for rehearing was denied on January 26, 1981. Hance v. Georgia, __U.S.__, 49 U.S.L.W. 3532 (U.S. Jan. 27, 1981).

(5) On February 2, 1981, the Superior Court of Muscogee County set Friday, February 20, 1981 as the date for the execution of William Hance's death sentence.

(III. RESPECTS IN WHICH PETITIONER HANCE'S RIGHTS HAVE BEEN VIOLATED)

(6) William Hance has been convicted and sentenced to death in violation of Sections 2-101, 2-110, 2-111, 2-113, and 2-114 of the Constitution of 1976 of the State of Georgia and of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States in the following respects:

(A.) The Arrest and Interrogation Without Probable Cause

(7) The custodial interrogation and eventual arrest of William Hance without probable cause, which resulted directly in the seizure of physical evidence and the obtaining of statements by petitioner Hance introduced by the State during his trial, violated his rights guaranteed by Sections 2-101, 2-111,

and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States.

(8) United States military investigators seized William Hance, removed him to military headquarters, and held him for custodial interrogation for over eighteen hours upon facts -- the disappearance of a local woman and information that Hance had given the woman a ride to a local bar (T. 697-98) -- not amounting to probable cause. As a result of his illegal seizure, authorities obtained statements used against petitioner Hance at his trial as well as items of physical evidence.

(B.) The Violation of Miranda

(9) The failure by United States military investigators to cease custodial interrogation of William Hance after he requested the opportunity to consult with an attorney, and the introduction by the State into evidence of statements and physical evidence obtained following petitioner Hance's unheeded request, violated his rights guaranteed by Sections 2-101, 2-111, and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

(10) After United States military investigators seized William Hance and read to him his Miranda rights, he requested the opportunity to speak with an attorney (T. 737, 930). His request was not honored, and statements and physical evidence obtained after this request were admitted into evidence against him at trial.

(C.) The Denial of Access to Counsel

(11) The intentional, knowing or reckless refusal by United States military investigators and Columbus, Georgia police officials to reveal the whereabouts of William Hance to his attorney during Hance's incommunicado interrogation by those officers extending over a period of three days, despite the attorney's persistent efforts to locate his client, violated petitioner Hance's rights, guaranteed by Sections 2-101, 2-111, and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

(12) An attorney who had previously represented Wiliam Hance contacted by telephone and visited Columbus police (T. 907-08) and United States military investigators (T. 907-08) when he learned of petitioner Hance's arrest in an effort to reach his client. He was not told where Mr. Hance was being kept by either law enforcement agency, but only learned of petitioner Hance's whereabouts three days later on receiving a postcard from his client (T. 909).

(D.) The Exclusion of Evidence Bearing on Involuntariness

(13) The trial court's refusal to permit the jury to hear testimony by William Hance's attorney concerning petitioner Hance's demeanor and state of mind on the day after the State had obtained a written statement from him, even though the State had deliberately or knowingly denied the attorney access to petitioner Hance prior to that time, and the court's refusal to let the jury hear testimony by William Hance concerning his

willingness during his interrogation to submit to a polygraph examination prevented the jury from making a fair and impartial decision on the voluntariness of petitioner Hance's statements, violating his rights guaranteed by Sections 2-101 and 2-113 of the Constitution of 1976 of the State of Georgia and by the Fifth and Fourteenth Amendments to the Constitution of the United States.

(14) The attorney who tried to locate William Hance during his incommunicado interrogation was called to the stand to testify to petitioner Hance's demeanor and physical circumstances when he was finally located the day following the interrogation (T. 909-11) and concerning his prior knowledge of Hance's reactions to stress (T. 912-14), both factors related to the issue of the voluntariness of his statements during the interrogation period. The trial court refused to permit any evidence on either fact (T. 910, 914). William Hance attempted to demonstrate his efforts to cooperate with authorities and his belief in his own non-involvement in the crime by developing before the jury testimony that he had requested a polygraph examination from investigating officers (T. 731-34). The trial court refused to permit petitioner Hance to give that testimony (T. 747).

(E.) The Unwarranted Introduction of Portions of the Victim's Corpse into Evidence

(15) The State's introduction into evidence during William Hance's trial of portions of the victim's corpse, when adequate photographic depictions of these items had already been introduced was needlessly inflammatory, violating petitioner

Hance's rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(16) Although several closeup photographs of the scene of the crime and the condition of the victim's body were admitte into evidence (T. 517-19; State's Ex. 7-17), the trial court neve theless permitted the State to introduce into evidence actual pieces of the victim's jawbone and skull (T. 875; State's Ex. 22-26).

(F.) The State's Use of a Prior Arrest

(17) The State's deliberate act in repeatedly bringing to the attention of the jury certain information concerning a prior arrest of William Hance, as to which no conviction had ev been obtained violated his rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(18) During cross-examination of a witness for William Hance, the State -- adopting the discredited "Did you know . . ." form -- asked the witness whether she knew that petitioner Hanc had been arrested or indicted (but apparently not convicted) on September 3, 1968 in Norfolk, Virginia for "unlawfully and feloniously and maliciously strik[ing] and wound[ing] a Shirley Humphrey with an iron pipe with intent to maim, disable, disfigure or kill." (T. 926). The State referred again to the unproven charge during its closing argument at the guilt phase (T. 1074) and the sentencing phase (T. 1144) of petitioner

Hance's trial.

(G.) The Needlessly Extensive Evidence of Another Crime

(19) The State's introduction into evidence during William Hance's trial of detailed testimony and physical evidence concerning another "similar crime" allegedly committed by petitioner subsequent to that involved in this case, and the State's repeated reference to that other crime, was so needlessly prejudicial and inflammatory that it violated petitioner's rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(20) Over continued objection by the defense (T. 414, 437-40, 454-56, 631-33, 636, 669-70) the State introduced unnecessarily detailed and inevitably prejudicial testimony (T. 437, 607-670) and physical evidence, including photographs (T. 669-72) concerning a crime committed subsequent to that involved in this case.

(H.) The Trial Court's Unconstitutional Instructions on Presumptions

(21) The trial court's instructions to William Hance's jury at the close of the guilt phase of his trial, which permitted the jury to find essential elements of the crime in reliance upon certain Georgia statutory and common law presumptions, shifted the burden of proof to petitioner Hance, and violated petitioner Hance's right to proof by the State of every element of the crime beyond a reasonable doubt, guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to the Constitution of the United States.

(22) The trial court instructed William Hance's jury that "when witnesses appear and testify they are presumed to speak the truth and are believed by the jury unless it is established that they are unworthy of belief" (T. 1084) and that "the acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." (T. 1093).

(I.) The Trial Court's Refusal to Give A Specific Venue Charge

(23) The trial court's refusal, in a case in which the issue of venue was crucial, to grant the request of William Hance's attorney for the jury to receive an express charge at the close of the guilt phase that venue was an element of the crime, violated petitioner Hance's right to a verdict based upon proof by the State of every element of the crime beyond a reasonable doubt, guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to Constitution of the United States.

(24) Although the trial court had indicated that it would expressly instruct William Hance's jury on the element of venue (T. 1103-04), it did so only by charging the jury that "if you find andbelieve . . . that the defendant did in the County of Muscogee, State of Georgia, with malice aforethought, kill" etc. even though the issue of venue was crucial to this case (T. 493-500), since if the victim were killed several feet closer to the adjacent federal right-of-way from where the State alleged she

was killed, jurisdiction over the crime would have rested with United States military authorities, not the State of Georgia.

(J.) The Exclusion of Relevant Mitigating Testimony

(25) The trial court's refusal to permit William Hance to testify during the sentencing phase of his trial concerning relevant mitigating evidence violated his rights guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(26) William Hance took the stand during the penalty phase of his trial among other things to insist that, despite the jury's verdict, he did not remember committing the crime (T. 1124-26). The State successfully objected to the introduction of this potentially significant mitigating testimony (T. 1128).

(K.) The State's Arguments to the Jury

(27) The State's opening argument to the jury, its closing argument at the close of the guilt phase, and its closing argument at the sentencing phase of William Hance's trial, which were characterized by repeated references to extra-record evidence, by references to the personal beliefs and opinions of the prosecutor, and by appeals to passion and prejudice, violated petitioner Hance's right guaranteed by Sections 2-101 and 2-114 of the Constitution of 1976 of the State of Georgia and by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(28) During opening argument, the State referred expressly to the jury not only to evidence it expected to present during

the course of the trial but to "other evidence that I'm not at liberty to go into at this time (T. 418). During closing argument at the guilt phase, the State suggested that petitioner Hance was an animal (T. 1058). The prosecutor, during the guilt and sentencing closings, made extensive reference to his own personal life as an FBI agent (T. 1061), expressed his personal opinions on why people confess (id.), told the jury how infrequently his office decided to recommend a death sentence (T. 1137-38), stated that he was personally shocked and offended by defense counsel's closing argument (T. 1149-50), expressed his personal belief that a death sentence was a deterrent (T. 1151), assured the jury that they would not bear the personal responsibility for their decision to impose a death sentence (T. 1154-55), suggested that if petitioner Hance received a life sentence he might escape, (alluding to James Earl Ray's escape attempt) (T. 1157), suggested that petitioner Hance would pose a threat to Georgia prison guards and other inmates (T. 1157-58), and intimated that imposing a death sentence was the moral equivalent to serving one's country in time of war (T. 1158-60).

(L.) The Ineffective Assistance of Counsel During the Sentencing Phase

(29) The attorneys appointed to represent William Hance as co-counsel failed to render effective assistance to him during the sentencing phase of his trial, in violation of his rights guaranteed by Sections 2-101 and 2-111 of the Constitution of 1976 of the State of Georgia and by the Sixth and Fourteenth Amendments to the Constitution of the United States.

(30) William Hance represented himself during his trial, but the Public Defender was appointed as co-counsel (Motion H.T. 5-12). During the guilt phase, it became clear that petitioner Hance was not skilled at trial practice, but instead was sometimes confused and lacking in knowledge of capital procedures (e.g., T. 598, 749). Although a great deal of mitigating evidence could have been developed by co-counsel even without petitioner Hance's assistance for use during the sentencing phase, no such evidence was developed or presented by counsel

(M.) The Physical Circumstances of the Trial

(31) The attempt to hold William Hance's trial in a new courtroom without proper acoustics, which resulted in repeated complaints from all present, including the jury, that they simply could not hear petitioner and other participants in the trial, violated petitioner Hance's rights guaranteed by Section 2-101 of the Constitution of 1976 of the State of Georgia and by the Fourteenth Amendment to the Constitution of the United States.

(32) William Hance's case was the first case tried in the new courtroom in the Superior Court of Muscogee County (T. 397-98). The court (T. 398, 597) and the jury (e.g., T. 485, 521-22) repeatedly complained that the lack of a microphone or any audio systems and the acoustics of the room kept them from hearing petitioner Hance and other witnesses.

(IV. PREVIOUS PROCEEDINGS THAT PETITIONER HAS UNDERTAKEN TO SECURE RELIEF)

(33) Except as set forth in paragraphs 3 and 4 of this

petition, William Hance has undertaken no other proceedings to secure relief from his convictions and sentences.

(V. PRAYER FOR RELIEF)

WHEREFORE, William Hance respectfully prays for an order:

(i) staying his execution pending final disposition of this matter;

(ii) permitting him to file this petition without prepayment of costs, and to proceed in forma pauperis;

(iii) directing a writ of habeas corpus to respondent, requiring him to appear and answer the allegations of this petition;

(iv) according petitioner Hance an evidentiary hearing on the allegations of his petition;

(v) after a full and complete hearing, relieving him of his unconstitutional convictions and sentences; and

(vi) allowing him such other, further and alternative relief as may seem just, equitable and proper.

Respectfully submitted,

STEVEN A. KERMISH
1314 Rhodes Haverty Building
134 Peachtree Street N.W.
Atlanta, Georgia 30303
(404) 525-0457

ATTORNEY FOR PETITIONER

Dated: February 17, 1981

STATE OF GEORGIA

COUNTY OF FULTON

VERIFICATION

Before the undersigned, an officer duly authorized by law to administer oaths, appeared Steven A. Kermish , who, being duly sworn, did depose and say as follows:

I am a member in good standing of the Bar of the State of Georgia;

I am the duly authorized attorney for WILLIAM HENRY HANCE, the Petitioner herein, authorized to prepare and verify the within and foregoing Petition;

I have read the within and foregoing Petition and know the contents thereof;

I know of my personal knowledge that all the facts stated therein are true, except such as are stated on information and belief;

As to the subject matter, I believe the Petition to be true; and,

I signed this Verification on behalf of the Petitioner because the within and foregoing Petition deals chiefly with matters of law and legal inferences to be drawn from facts of record, with respect to which I as an attorney have more knowledge than Petitioner, and for the further reason that the Petitioner, whose execution date is set for February 20, 1981 , is located at the Georgia Diagnostic and Classification Center at Jackson, Georgia, and there is insufficient time to secure this personal Verificati

STEVEN A. KERMISH

ATTORNEY FOR PETITIONER

Sworn to and subscribed before me,
this the _____ day of _____,
1981.

Notary Public

My Commission expires:

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IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM HENRY HANCE,	:	
Petitioner,	:	
v.	:	CIVIL ACTION FILE NO. 4967
WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS
Respondent.	:	

Comes now WILLIAM HENRY HANCE, Petitioner in the above-styled action, and Amends his Petition for Writ of Habeas Corpus as follows:

1.

Petitioner was denied effective assistance of counsel in that his trial counsel failed to file a Motion to Suppress his confession pursuant to Brown v. Illinois, 1422 U.S. 590, 95 S.Ct. 2254, _____ (1975); failed to produce an expert witness to contest the issue of venue; failed to move for a psychiatric evaluation to determine Petitioner's competency; failed to present witnesses during the mitigation phase of Petitioner's criminal trial.

2.

Petitioner contends that the Court erred in allowing his confession into evidence because it was the result of an illegal seizure and that the mere giving of the Miranda warnings was insufficient to dissipate the taint of said illegal seizure. Brown v. Illinois, 1422 U.S. 590, 95 S.Ct. 2254, (1975).

3.

The Court erred in charging the jury as to the aggravating circumstances which were used to justify the imposition of the death penalty, especially as to the elements of aggravated battery.

4.

The Court erred in not determining Petitioner's competency to assist in his own defense when it failed to follow the procedure set out in Faretta v. California, 95 S.Ct. 2525 (1975).

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5.

The death penalty is in fact administered and applied arbitrarily, capriciously, and whimsically in the State of Georgia; and Petitioner was sentenced to die, and will be executed, pursuant to a pattern and practice of wholly arbitrary and capricious infliction of that penalty in violation of his rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) The Supreme Cout of the United States upheld the Georgia capital punishment statutes "on their face" only upon the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153, 198 (1976). As those statutes have been applied, however, death sentences in Georgia have in fact been imposed in an arbitrary and capricious manner.

(b) Georgia cases similar to that of Petitioner in many respects, including both the nature and circumstances of the offense, the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

(c) Georgia cases more aggravated than that of Petitioner in many respects, including both the nature and circumstances of the offense and the age, prior record, relative culpability, and life and character of the accused have resulted in lesser punishments than death.

(d) There is no rational, constitutionally permissible way of distinguishing the few cases in which the death penalty has been imposed from the many cases in which it has not been imposed.

6.

Petitioner's death is being exacted pursuant to a pattern and practice of Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of race, sex and poverty

in the administration of capital punishment. For this reason, the imposition and execution of Petitioner's death sentence under Georgia law and practice violate the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

(a) The death penalty in the United States and in the State of Georgia has been discriminatorily imposed against males, poor persons and defendants accused of killing Caucasians.

(b) Petitioner's death sentence was imposed pursuant to the pattern of racial, economic and sexual discrimination set forth in paragraphs (a) and (b) above.

7.

The theoretical justifications for capital punishment are groundless and irrational in fact, and death is thus an excessive penalty which fails factually to serve any rational and legitimate social interests that can justify its unique harshness, in violation of Petitioner's rights guaranteed by the Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) The death penalty provided by Georgia Law violates the principle that a criminal sanction "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Gregg v. Georgia, 428 U.S. 153, 183 (1976).

(b) Executions do not have an identifiable deterrent effect. As the Georgia State Department of Offender Rehabilitation acknowledged in a November, 1973 study entitled Capital Punishment in Georgia: An Empirical Study 1943-1965, "Despite the fact that Georgia used the death penalty more often than any other state in the country, its homicide rate was also the highest in the nation. This suggests that

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the death penalty is not effective as a deterrent." Study at 451 (emphasis added).

(c) Executions set socially sanctioned examples of, and provide an inducement to, violence.

(d) Public sentiment for retribution is not so strong as to justify use of the death penalty.

(e) There is no penal purpose served by execution which is not more effectively or efficiently served by life imprisonment.

8.

Petitioner's trial jury was unrepresentative and biased in favor of the prosecution on the issue of Petitioner's guilt or innocence of the crime with which he was charged and biased on the issue of sentence in violation of his rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

(a) Social science research demonstrates that jurors without conscientious or religious scruples against capital punishment constitute an element of the community which, as a whole, tends to be biased in favor of the prosecution in resolving issues of guilt or innocence.

(b) Exclusion of jurors because of their conscientious or religious scruples resulted in a jury in Petitioner's case which was conviction-prone and incapable of rendering a fair and impartial verdict on guilt or innocence.

WHEREFORE, Petitioner prays that his Writ be granted and that his conviction and sentence be reversed.

Respectfully submitted,

KERMISH, LABOVITZ, MARCUS, BRAZIER & ROSENBERG

By _____
Stephen A. Kermish
Attorney for Petitioner

1314 Rhodes Haverty Building
134 Peachtree Street
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404/525-0457

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

WILLIAM HENRY HANCE,	:	
Petitioner,	:	
	:	CASE NO. 4967
v.	:	
WALTER D. ZANT, WARDEN,	:	
Respondent.	:	

MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS

MR. STEPHEN A. KERMISH
Attorney for Petitioner
1314 Rhodes Haverty Building
134 Peachtree Street
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404/525-0457

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ARGUMENT I

Petitioner, WILLIAM HANCE, contends that all statements and acts by him were the result of and a product of a custodial interrogation and as such, should be suppressed pursuant to both the Fourth and Fifth Amendments of the United States Constitution. There can be no doubt that a "request to come to a police station may easily carry an implication of obligation, while the appearance itself, as clearly stated to be voluntary, may be an awesome experience for the ordinary citizen." Dunaway v. New York, 99 S.Ct. 2248, footnote 6 (1979). Defendant recognizes that the question of custody is often difficult to ascertain as is the concept of when a seizure has taken place. As stated in United States v. Cavello, 507 F.2d (5th Cir.) 1975. The factors may be properly analyzed are (1) probable cause to arrest; (2) subjective intent of the police; (3) subjective belief of the defendant; and (4) focus of the investigation.

Petitioner contends that his situation is analogous to the facts in Dunaway. There, petitioner was taken into custody, although he was not told he was under arrest. Dunaway, further, was placed in an interrogation room as was HANCE in the instant case. In Dunaway, the police did give the petitioner Miranda warnings and argued that, because of such a warning, the confession given by Dunaway was voluntary. In Dunaway, the Supreme Court recognized that the Miranda warnings alone were insufficient to attenuate or dissipate the initial illegal detention and that they could not be considered as intervening events to break the connection between the illegal detention and his confession. As the Supreme Court stated, if Miranda warnings by themselves were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially deleted... arrest made without warrant, without probable cause, or questioning or investigation with the occurrence or the knowledge that evidence derived therefrom could well be made admissible at trial by simple, expedience of giving Miranda warnings."

As observed by the Dunaway Court, the satisfying of Fifth

Amendment safeguards would only be a threshold condition of the Fourth Amendment analysis. To admit petitioner's confession in such a case would allow law enforcement officers to violate the Fourth Amendment with impunity safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth.

The Cavollo Court has defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way. It appears here that Petitioner, HANCE, was unquestionably in custody not only at the CID Headquarters, but at the time he entered the Captain's office. There, he was confronted with two investigators as well as his commanding officer. Furthermore, he was told that he was a suspect and that the investigation had focused on him. Certainly, under those circumstances, no man would feel that he was free to terminate the conversation and merely walk away. It is also axiomatic that, while HANCE went with the officers without a struggle, one cannot consent to accompany agents who have already seized him.

A review of the records indicates that Petitioner, HANCE, was arrested because he had been seen with one of the victims (hearsay testimony) and a tape of a phone conversation was played for HANCE'S commanding officer. HANCE'S company commander and first sergeant listened to the tape recording and gave the opinion that they felt it was HANCE'S voice. (T. 19, 20, 21.) Because HANCE had been seen with one of the victims and the phone call tape sounded like HANCE'S voice, the investing officers made the determination that probable cause existed to arrest Petitioner. (T. 22). Thus, it is seen that the investigating officers, not a neutral or detached magistrate, made the determination of probable cause to arrest HANCE.

This determination was made despite the fact that the Judge Advocate Corps also makes the determination as to probable cause and decides whether or not an individual should be detained. (T. 49). Therefore, HANCE contends that his arrest was illegal because it was not made by a neutral and detached magistrate, but

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rather by investigating officers. Coolidge v. New Hampshire, 403 U.S. 443; State v. Guhl, 140 Ga. App. 23.

HANCE further contends that no probable cause existed for his arrest. The Supreme Court of the United States has observed that the Fourth Amendment proscription against unreasonable searches and seizures applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Supreme Court has determined that a person has been seized within the meaning of the Fourth Amendment only if and in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave. United States v. Mendenhall, 100 S.Ct. at 1877.

"The exclusionary rule would be substantially deleted ... arrest made without warrant or without probable cause, or questioning or investigation would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by simple expedience of giving Miranda warnings." Dunaway, supra. As observed by the Dunaway Court, the satisfying of Fifth Amendment safeguards would only be a threshold condition of the Fourth Amendment analysis. To admit Petitioner's confession in such a case would allow law enforcement officers to violate the Fourth Amendment with impunity safe in the knowledge that they could wash their hands of the procedural safeguards of the Fifth.

ARGUMENT II

Petitioner HANCE contends that he was denied his right to a fair trial by reason of ineffective assistance of counsel. There can be no doubt that the Sixth Amendment to the Constitution of the United States guarantees representation by competent counsel and that competent counsel means counsel likely to render and rendering reasonably effective assistance. This is true whether the case involves appointed or retained counsel. Cuyler v. Sullivan, 27 Cr. L. Rptr. 3100 (1980).

In order to determine whether or not counsel has been effective, certain questions must be determined. One of the basic issues is whether or not defense counsel investigates all substantial defenses available to the defendant and asserts them in a proper and timely manner. Reece v. Georgia, 350 U.S. 85 (1955). The Supreme Court also stated in United States v. Ash, 413 U.S. 300 (1973), that counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that adversary system requires that all available defenses are raised. The fact that the Dunaway argument as set out above was not raised at Petitioner's trial is clear indication that counsel was ineffective.

Furthermore, a reading of transcript discloses that no witnesses were called on behalf of Petitioner HANCE, either at the trial or in the mitigation portion of the trial. It has been stated that a defense attorney who has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance has failed his client and is therefore ineffective no matter that he exercised the utmost skill at trial. Moore v. United States, 432 F.2d 730 (3rd Cir., 1970). A federal judge in the Northern District of Texas has described such conduct in the following manner: "The lawyer who does not probe, does not inquire, does not seek out all facts relevant to his client's case, is prepared to do little more than stand still at the time of trial. Smotherman v. Beto, 276 F.2d 579 (N. Dist. of Texas 1967). Because counsel for Defendant did not assert all legal defenses ava lable at trial nor did he trouble himself with subpoenaing witnesses or arranging for

their attendance for his client, he has been rendered totally ineffective.

ARGUMENT III

Violation of Miranda and Denial of Access to Counsel (Paragraphs 9 - 14 of Habeas Corpus Petition

After United States military investigators seized Petitioner and read to him his Miranda rights, Petitioner requested the opportunity to speak with an attorney. (T. 737, 930). His request was not honored, and statements and physical evidence obtained after this request were admitted into evidence against him at trial.

During Petitioner's incommunicado interrogation by military authorities and police officials, extending over a period of three days, Petitioner's attorney made repeated attempts to learn the location of his client and speak with him concerning the pending charges. (T. 907 - 909). These attempts were thwarted by police and military officials who sent the attorney on a circular wild-goose chase, refusing to tell him the true location where Petitioner was being held. (T. 907 - 909).

Statements obtained after an accused person has requested to speak with an attorney are inadmissible under the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel. Edwards v. Arizona, __ U.S. ____, 29 Cr. L. Rptr. 3037 (May 18, 1981).

Further, notwithstanding any judgment of the credibility of Petitioner's testimony, the unconscionable acts of police and military officials in denying Petitioner's counsel access to his client, renders all statements obtained pursuant to police and military interrogation inadmissible.

Isolation of an accused person from counsel renders any subsequent statements involuntary. Chambers v. Florida, 309 U.S. 227, 238 (1940). We "can't blind ourselves to what experience teaches," incommunicado interrogation is often used in obtaining an involuntary confession. Haynes v. Washington, 3737 U.S. 503, 514 (1963). In Darwin v. Connecticut, 391 U.S. 346, 347, 350 (1968), the Court found as the key factor rendering a confession involuntary the refusal by law enforcement officials to allow counsel to see the accused during interrogation. See, also, Spano v. New York, 360

U.S. 315, 318, 322-3 (1959).

Recently, in Fare v. Michael C., 442 U.S. 707, 719 (1979), the Court recognized the critical position of counsel during custodial interrogation as a Fifth Amendment right.

Because a lay person "may not be aware of the precise scope, the nuances and boundaries of his Fifth Amendment privilege," the assertion of that right "often depends upon legal advice from someone who is trained and skilled in the subject matter." Maness v. Meyers, 419 U.S. 449 (1975); Smith v. Estelle, __ U.S. ___, 29 Cr. L. Rptr. 3031 (May 18, 1981).

The trial court at Petitioner's trial further exacerbated the error and deprived Petitioner the opportunity to present the crucial issue of the voluntariness of his confession to the jury where the trial court refused to allow Petitioner's attorney to testify concerning Petitioner's demeanor and physical circumstances when he was finally located (T. 909-11) and concerning the attorney's prior knowledge of Petitioner's reactions to stress (T. 912-914).

ARGUMENT IV

Unwarranted Introduction of Portions of the Victim's Corpse Into Evidence (Paragraphs 15-16 of Habeas Corpus Petition

At Petitioner's trial, the State was allowed to introduce as evidence portions of the victim's corpse. Although several closeup photographs of the scene of the offense and the condition of the victim's body were admitted into evidence (T. 517-519), the State, nevertheless, introduced into evidence actual pieces of the victim's jawbone and skull (T. 875).

This gruesome and inflammatory evidence was not offset by any legitimate evidentiary purpose; any evidentiary value of the condition of the deceased's body could be more than adequately served by the photographs. There was no probative value to pieces of an already decomposed body; the introduction of this evidence can only be seen as an attempt to prejudice the jury.

Under common law, the introduction of inflammatory evidence was prohibited where its probative value was outweighed by its prejudicial effect. E.g., Maxwell v. United States, 368 F.2d 735, 739-40 (9th Cir. 1966); Holcomb v. State, 130 Ga. 154, 155 (1973).

In capital cases, this common law prohibition is raised to a constitutional level by the requirement that the death sentence be based on reason, rather than caprice and emotion. Gardner v. Florida, 430 U.S. 349 (1977).

ARGUMENT V

Jury Charge on Burden of Proof on Malice and Intent
(Paragraphs 21-22 of Habeas Corpus Petition)

The Georgia Murder Statute is set out in Ga. Code Ann. §26-1101. Under this statute, malice and intent are essential elements of the crime of murder and, as such, must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Davis v. State, 237 Ga. 279, 227 S.E. 2d 249 (1976).

The Court's charge to the jury in Petitioner's case on the essential element of intent was as follows:

> "... the acts of a person of sound mind and discretion are presumed to be the product of that person's will. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. (T. 1093).

Since intent is an element of the offense of murder, "it follows that the trial court may not withdraw or prejudice the issue by instruction that the law raises a presumption of intent from an act." Morisette v. United States, 342 U.S. 246, 274 (1952). See, also, United States v. United States Gypsum, 438 U.S. 422 (1978). A jury instruction is invalid when it creates a presumption which acts to shift the burden of persuasion of an element of the crime away from the prosecution and acts to place the burden of disproof of the element upon the accused. Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979).

In Sandstrom v. Montana, supra, the Court found defective a jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts," 422 U.S. at 513, in that it violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

Equally defective is the charge in Petitioner's case.

Numerous challenges to burden shifting charges similar to that in Petitioner's case caused the United States Fifth Circuit Court of Appeals to direct that:

> "No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is in language which could reasonably be interpreted as shifting the burden to the accused to produce proof of innocence." United States v. Chiantese, 560 F.2d 1244, 1255 (5th Cir. 1977).

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The fact that the jury was instructed on the requirement that the State prove the offense beyond a reasonable doubt does not affect the invalidity of the charge. In Sandstrom v. Montana, supra, the Court found that, given the common definition of "presume" as "to suppose to be true without proof," and given the lack of any qualifying instructions by the trial court as to the legal effect of the presumption as given, there was a possibility that the jury may have interpreted the instruction in either of two ways:

> "First, a reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considered greater than 'some' evidence -- thus effectively shifting the burden of persuasion on the element of intent."
> 442 U.S. at 517 (emphasis in original)

In Petitioner's case as in Sandstrom, no instructions were given to the jury defining the classification, nature or effect of presumptions in criminal proceedings. Also, the trial court failed to instruct the jury on the quantum of proof necessary to accomplish the rebuttal.

Unlike Sandstrom, Petitioner has been sentenced to death. This requires that this issue be viewed in a manner insuring the highest standards of due process in order to satisfy the Eighth and Fourteenth Amendments. See, Gardner v. Florida, 439 U.S. 239 (1977). The confusion which was inevitably caused by the trial court's charge directly contradicts the statement in Gregg v. Georgia, 428 U.S. 153 (1976) that:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a law suit. It would be virtually unthinkable to follow any other course ... It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."

ARGUMENT VI

Improper State's Arguments to the Jury (Paragraphs 27-28 of Habeas Corpus Petition

In the State's opening argument to the jury, its closing argument at the guilt phase and its closing argument at the sentencing phase, the prosecutor made numerous inflammatory remarks, expressed his personal opinion on issues, referred to facts not in evidence and made substantial misstatements of law.

During closing argument at the guilt phase, the State suggested that petitioner HANCE was an animal (T. 1058). The prosecutor, during the guilt and sentencing closings, made extensive reference to his own personal life as an FBI agent (T. 1061), expressed his personal opinions on why people confess (id), told the jury how infrequently his office decided to recommend a death sentence (T. 1137-38), stated that he was personally shocked and offended by defense counsel's closing argument (T. 1149-50), expressed his personal belief that a death sentence was a deterrent (T. 1151), assured the jury that they would not bear the personal responsibility for their decision to impose a death sentence (T. 1154-55), suggested that if petitioner HANCE received a life sentence he might escape, (alluding to James Earl Ray's escape attempt) (T. 1157), suggested that petitioner HANCE would pose a threat to Georgia prison guards and other inmates (T. 1157-58), and intimated that imposing a death sentence was the moral equivalent to serving one's country in time of war (T. 1158-60).

What the law condemns is "the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." Ruffin v. State, 243 Ga. 95 (1979); Floyd v. State, 143 Ga. 286 (1915).

"Prosecuting attorneys are no longer permitted to indulge themselves, or their audiences, in unrestrained abusive histrionics, giving their personal evaluations of what a low-down fellow the defendant really is," United States v. Windom, 510 F.2d 989, 994 (5th Cir. 1975).

The likelihood that the prosecutor's name-calling adversely influenced the jury has been recognized. As the Court explained in

Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969), the use of uncomplimentary names, " ... is especially likely to stick in the minds of the jury and influence its deliberations."

Expression of a personal belief is only tolerated when it is supported by the evidence at trial, United States v. Rodriguez, 585 F.2d 1234, 1243 (5th Cir. 1978); otherwise, implicit in the assertion of a personal belief is the fact that the prosecutor has based his opinion on something other than the record, Gradsky v. United States, 373 F.2d 706, 710 (5th Cir. 1967).

The prosecutor's expressed concern for the future of the judicial system if Petitioner did not receive the death sentence and the prosecutor's expressed opinion that the imposition of the death sentence was the moral equivalent of war exceeded the bounds of proper argument and was nothing more than inflammatory exaggeration. "It is beyond the bounds of propriety for a prosecutor to suggest that unless this defendant is convicted, it will be impossible to maintain 'law and order' ..." United States v. Barker, supra, at 1025.

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ARGUMENT VII

Exclusion of Relevant Mitigating Testimony
(Paragraphs 25-26 of the Habeas Corpus Petition

WILLIAM HANCE took the stand during the penalty phase of trial among other things to insist that he did not remember committing the crime. Petitioner's counsel also attempted to elicit Petitioner's testimony concerning his mental state on the day of the offense (T. 1124-1127). The State successfully objected to the introduction of this potentially significant mitigating testimony on the grounds that Petitioner's mental state had not previously been raised as an issue and there was no expert testimony on Petitioner's mental state. (T. 1128).

As the United States Supreme Court held in Lockett v. Ohio, 438 U.S. 586, 604 (1978):

> " ... we conclude that the sentences in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Clearly, Petitioner's perceptions of his mental state at the time of the offense would be important to a jury determining the appropriate punishment. In this case, the jury sentenced petitioner to death without being allowed the benefit of this information.

ARGUMENT IX

Faretta v. California Violation

(Paragraph 4 of Amendment to Petition

At Petitioner's trial, the trial court allowed Petitioner to act as co-counsel (T. 11-27-78 at p. 11).

In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that an accused person has the right of self-representation in a criminal proceeding against him. However, the Court also stated that, before an accused person be allowed to represent himself, the trial court should insure that the accused person "knowingly and intelligently forego" "the traditional benefits associated with the right to counsel." Faretta v. California, supra, at 835. It is the trial court's duty to make the defendant aware of the dangers and disadvantages of self-representation. Id.

That was clearly not done in this case. Although the trial court questioned Petitioner concerning the decision to proceed as co-counsel (T. 11-27-78 at pp. 7-11), the trial court never made Petitioner aware of the dangers and disadvantages of self-representation.

Further, although a psychological evaluation was made of Petitioner, no evidence from this evaluation was presented for examination and cross-examination before the court. Surely, the facts and circumstances of the offense charged should have created some doubts concerning Petitioner's ability to act as co-counsel in the mind of the trial court and led the trial court to hear some evidence on competency before a decision was made.

Doubts about Petitioner's ability to act as co-counsel surely should have been raised by the first words out of Petitioner's mouth after he was allowed to proceed as co-counsel:

"Mr. Hance: Your honor, I have a question, sir?

The Court: With respect to this motion? Go ahead.

Mr. Hance: If that confession is proved not to be mine, will I be acquitted?"

(T. 11-27-78 at p. 12).